Supreme Court, U.S.
FILED
JAN 25 1993
OFFICE OF THE CLERK

No. 92-1046

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA.,

Petitioner,

vs.

JOHN R. CAMP, JR., TRUSTEE, and SECURITIES INVESTOR PROTECTION CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Petitioner National Union Fire Insurance Company of Pittsburgh, PA. ("NUFIC") issued a fidelity bond to the Government Securities Corporation ("GSC" or "Debtor"), a securities broker-dealer, to protect it against damages resulting, among other things, from dishonest acts of its employees. Unfortunately, dishonest acts took place, causing damages in excess of the $500,000 bond limit. The fidelity bond contained a provision automatically terminating the bond upon a "taking over of the Insured by a receiver or other liquidator. . ." ("the termination clause"). NUFIC conceded that were the liquidation proceeding purely under the Bankruptcy Code, section 541(c)(1)(B) of the Code, 11 U.S.C. §541(c)(1)(B), would have invalidated the termination clause and hence made NUFIC liable. But NUFIC argued that section 541(c)(1)(B) did not apply because the liquidation proceeding was initiated under the Securities Investor Protection Act, 15 U.S.C. §78aaa *et seq.* ("SIPA").* Thus, the issue presented is

> Whether 11 U.S.C. section 541(c)(1)(B) applies in a liquidation proceeding under SIPA where SIPA section 78fff(b) requires that: "[t]o the extent consistent with the provisions of [SIPA], a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of Title 11;" where section 541(c)(1)(B) is contained in chapter 5 of Title 11; and where there is no inconsistency between the provisions of SIPA and that section.

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* For convenience, references herein to provisions of SIPA shall be to the United States Code, and hereinafter shall omit "15 U.S.C."

LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the Eleventh Circuit are as stated by the petitioner, except that the name of the Trustee herein is John R. Camp, Jr., and not John H. Camp, Jr. In addition, the law firm of Adorno & Zeder, P.A., is a party.**

The Securities Investor Protection Corporation ("SIPC") is created pursuant to a federal statute, and has no parent companies or subsidiaries.***

** Neal B. Shniderman, Esquire, formerly an attorney with the law firm of Blackwell & Walker, P.A., was the Trustee's lead counsel in this case. On April 1, 1992, having terminated his relationship with that firm, Mr. Shniderman became a member of the law firm of Adorno & Zeder, P.A. In order for Mr. Shniderman to be able to continue to represent him, the Trustee thereafter obtained Bankruptcy Court permission to engage Adorno & Zeder, P.A., as special counsel, in part, for purposes of this litigation.

*** SIPC's participation in this matter has been pursuant to SIPA section 78eee(d). In pertinent part, under that provision, SIPC is a party in interest as to all matters arising in a SIPA liquidation proceeding, "with the right to be heard on all such matters."

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
SUMMARY OF ARGUMENT	1
ARGUMENT	2
Nature of a SIPA Proceeding: Its History and Purposes	2
A. Section 60e of the Bankruptcy Act	3
B. SIPA	3
C. The SIPC Fund	4
D. Use of SIPC Funds to Satisfy Customer Claims	4
E. Bankruptcy Nature of a SIPA Proceeding	5
I. BECAUSE THE THRIFT AND BANK CASES DO NOT INVOLVE THE BANKRUPTCY CODE, THERE IS NO CONFLICT.	6
1. The Cases Relied Upon by NUFIC Are Irrelevant.	7
2. No Basis Exists to Apply Banking Law to the Liquidation of a Securities Broker-Dealer.	8
A. NUFIC's Erroneous Assertions Are Untimely Raised.	8
B. The Statutory Schemes Administered by the FDIC and SIPC Are Distinct.	10
i. The Powers of the FDIC Are Broader Than Those of SIPC.	10
ii. The Relationship of SIPC to the SEC and NASD	12
iii. The Bond Was Required Pursuant to NASD Rule, and Not SIPA.	14
iv. SIPC Never Approved of the Termination Clause.	16
v. NUFIC Is Held to Know the Law.	20

II. THE DECISION THAT SUBSTANTIVE PROVISIONS OF TITLE 11 APPLY IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT. 21

1. The Plain Meaning of Section 78fff(b) 22

2. NUFIC's Interpretation of Section 78fff(b) Limits the Trustee's Powers in a Manner Inconsistent With the Statutory Scheme and Detrimental to Creditors. 23

3. Nothing in the Legislative History of Section 78fff(b) Supports the Conclusion That Only Procedural Provisions Apply. 27

4. The Cases Cited by NUFIC Present No Conflict. 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES:	Page
Austin Mun. Securities v. NASD, 757 F.2d 676 (5th Cir. 1985)	13
In re Bell & Beckwith, 50 B.R. 422 (Bankr. N.D. Ohio 1985)	25
In re Bell & Beckwith, 124 B.R. 35 (Bankr. N.D. Ohio 1990)	17
Blum v. Stenson, 465 U.S. 886 (1984)	27
California Union Insurance Co. v. American Diversified Savings Bank, 948 F.2d 556 (9th Cir. 1991)	7
Duel v. Hollins, 241 U.S. 523 (1916)	3
Duignan v. United States, 274 U.S. 195 (1927)	9
Exchange National Bank v. Wyatt, 517 F.2d 453 (2d Cir. 1975)	5
Executive Securities Corp. v. Doe, 702 F.2d 406 (2d Cir. 1983), *cert. den.*, 464 U.S. 818 (1983)	23
Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)	20,21
FDIC v. Aetna Cas. and Sur. Co., 903 F.2d 1073 (6th Cir. 1990)	7,8
First Jersey Securities, Inc. v. Bergen, 605 F.2d 690 (3d Cir. 1979), *cert. den.*, 444 U.S. 1074 (1980)	13
Gold v. Hyman, [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,043 (S.D.N.Y. 1975)	23
In re Golden, 16 B.R. 580 (Bankr. S. D. Fla. 1981)	21
Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)	21
In re Investors Center, Inc., 129 B.R. 339 (Bankr. E.D.N.Y. 1991)	14
Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923)	30

Table of Authorities Continued

	Page
In the Matter of Lewellyn, 26 B.R. 246 (Bankr. S.D. Iowa 1982)	24
In re Manning, 831 F.2d 205 (10th Cir. 1987)	25
In re MV Securities, Inc., 48 B.R. 156 (Bankr. S.D.N.Y. 1985)	18
Petition of Public Nat. Bank of New York, 278 U.S. 101 (1928)	22
In re Prima, 88 F.2d 785 (7th Cir. 1937)	21
Redington v. Touche Ross & Co., 612 F.2d 68 (2d Cir. 1979)	29
SEC v. Aberdeen Securities Co., 480 F.2d 1121 (3d Cir.), *cert. den. sub nom., Seligsohn v. SEC*, 414 U.S. 1111 (1973)	5
SEC v. Aberdeen, 526 F.2d 603 (3d Cir. 1975)	29
SEC v. Albert & Maguire Sec. Co., 560 F.2d 569 (3d Cir. 1977)	5,23
SEC v. Morgan, Kennedy & Co., 533 F.2d 1314 (2d Cir.), *cert. den.*, 426 U.S. 936 (1976)	11
SEC v. Packer, Wilbur & Co., 498 F.2d 978 (2d Cir. 1974)	4
SEC v. S. J. Salmon & Co., 375 F.Supp. 867 (S.D.N.Y. 1974)	17
SEC v. Wick, 360 F.Supp. 312 (N.D. Ill. 1973)	28
Sharp v. Federal Savings & Loan Insurance Corp., 858 F.2d 1042 (5th Cir. 1991)	7
Singleton v. Wulff, 428 U.S. 106 (1976)	9
SIPC v. Ambassador Church Finance/Development Group, Inc., 788 F.2d 1208 (6th Cir.), *cert. den. sub nom., Pine Street Baptist Church v. SIPC*, 479 U.S. 850 (1986)	5
SIPC v. Associated Underwriters, Inc., 423 F.Supp. 168 (D. Utah 1975)	5
SIPC v. Barbour, 421 U.S. 412 (1975)	2,3
SIPC v. Charisma Sec. Corp., 506 F.2d 1191 (2d Cir. 1974)	22,29

Table of Authorities Continued

	Page
SIPC v. Christian-Paine & Co., 755 F.2d 359 (3d Cir. 1985)	23
SIPC v. Poirier, 653 F.Supp. 63 (D. Ore. 1986)	25
SIPC v. Securities Northwest, Inc., 573 F.2d 622 (9th Cir. 1978)	22
Taylor v. Freeland & Kronz, ___ U.S. ___, 112 S. Ct. 1644 (1992)	9
United States v. Johnson, 268 U.S. 220 (1925)	20
United States v. NASD, 422 U.S. 694 (1975)	13
In re Waddell Jenmar Securities, Inc. (SIPC, Trustee v. NUFIC), Case No. A-89-0068, Adv. Pro. No. 90-2149 (Bankr. M.D.N.C. Feb.18, 1992), *affirmed* (M.D.N.C. Aug. 12, 1992), *appeal pending*, No. 92-2158 (4th Cir.)	6
Wright v. Union Central Ins. Co., 304 U.S. 502 (1938)	21

STATUTES AND RULES:

Securities Investor Protection Act of 1970, 15 U.S.C. §	
78fff(c)(1)	21,27-30
78o(c)(3)	14
Securities Investor Protection Act of 1970, as amended, 15 U.S.C. §	
78ccc(a)(1)(A)	6
78ccc(a)(2)(A)	13
78ddd(a)(1)	4
78ddd(f)	4
78ddd(g)	4
78ddd(h)	4
78eee(a)(1)	14
78eee(a)(3)	14
78eee(b)(3)	5,26
78eee(b)(4)	5

Table of Authorities Continued

	Page
78eee(b)(5)(B)	26
78fff(a)(4)	5,23
78fff(b)	1,5,8,*passim*
78fff(e)	26
78fff-1(a)	23
78fff-1(b)	24
78fff-2(a)(3)	23
78fff-2(c)(1)	5
78fff-3(a)	4,5,16
78iii(c)	14,15
78iii(e)	16
78*lll*(10)	26
Bankruptcy Act (repealed 1979), 11 U.S.C. §	
96(e)	3
96(e)(2)	3
96(e)(4)	3
641	29
643	29
Bankruptcy Code, 11 U.S.C. §	
103(a)	25
109(b)(2)	7
322	26
362	23
362(a)	26
365(d)(1)	26
506(a)	26
506(d)	26
541(c)(1)(B)	1,6,7,*passim*
704(1)	24
723(c)	26
726	26

Table of Authorities Continued

	Page
742	23
Other Statutory Provisions	
12 U.S.C. §1464(d)(6)(A)	7
12 U.S.C. §1464(d)(6)(B)	7
12 U.S.C. §1821(c)	7
12 U.S.C. §1821(e)(12)(A)	8
12 U.S.C. §1828(e)	10
15 U.S.C. §78c(a)(26)	12
15 U.S.C. §78o(b)	13
15 U.S.C. §78o(b)(8)	13
15 U.S.C. §78o-3	13,14
Pub. L. No. 94-29, 89 Stat. 126 (1975)	14
Pub. L. No. 95-283, 92 Stat. 249 (1978)	4
Pub. L. No. 95-283, 92 Stat. 259 (1978)	28
Pub. L. No. 95-598, 92 Stat. 2549 (1978)	4,20-21
Pub. L. No. 95-598, 92 Stat. 2675 (1978)	28
Pub. L. No. 96-433, 94 Stat. 1855 (1980)	4
Pub. L. No. 97-303, 96 Stat. 1409 (1982)	4
Rules	
12 C.F.R. §547.2	7
12 C.F.R. §547.3	7
17 C.F.R. §240.3a40-1	14
NASD Manual-Rules of Fair Practice, *reprinted in* NASD Manual-Rules of Fair Practice (CCH)	
Art. I, §5(a)	15
Art. II, §1(c)	15
LEGISLATIVE MATERIALS:	
S. Rep. No. 1218, 91st Cong., 2d Sess. (1970)	3,14
H.R. Rep. No. 1613, 91st Cong., 2d Sess. (1970)	3,12,14,16

Table of Authorities Continued

	Page
H.R. Rep. No. 746, 95th Cong., 1st Sess. (1977) .	27
S. Rep. No. 989, 95th Cong., 2d Sess. (1978)	8
S. Rep. No. 763, 95th Cong., 2d Sess. (1978)	28
Hearings on H.R. 8331 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. (Aug. 1, 1977)	28
Hearings on S. 2348, S. 3988, and S. 3989 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. (April 17, 1970)	11,12
115 Cong. Rec. 15165-15170 (June 9, 1969)	10
116 Cong. Rec. 40868 (Dec. 10, 1970)	14
PUBLICATIONS AND TREATISES:	
3 *Collier on Bankruptcy* (14th Ed. 1977)	
¶¶60.71-60.76	3
¶60.85	23
4 *Collier on Bankruptcy* (15th Ed. 1992)	
¶541.22	21
L. Barbagallo, *The Financial Institution Bond, Standard Form 14—Revision of the Stockbrokers Blanket Bond, Standard Form 14—October 1987* (ABA Tort and Insurance Practice Section Annual Meeting 1988)	18-19
First Annual Report of SIPC (1971)	16
GAO, *The Regulatory Framework Has Minimized SIPC's Losses* (Sept. 1992)	8
J. Knoll, *Special Provisions of Brokers, Insurance Companies and Savings and Loan Blanket Bonds, reprinted in Financial Institution Bonds* (ABA Tort and Insurance Practice Section 1989)	19
SIPC and Customer Protection (2d ed. April 1986)	11-12
SIPC Second Annual Report (1972)	17
N. Wolfson, *Regulation of Brokers, Dealers and Securities Markets* (1977)	13

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

This Court should not grant the petition for a writ of certiorari for the following reasons:

1. There is no conflict between the decision of the Eleventh Circuit and that of any other court of appeals. Every court addressing the issue of whether section 541(c)(1)(B) of the Bankruptcy Code invalidates the termination clause in a fidelity bond in a SIPA case has held that it does. The cases cited by NUFIC in an attempt to create a conflict are irrelevant. Those cases, in which the termination clauses were contained in fidelity bonds issued to thrifts and a bank, involve different facts, different insured institutions, and above all, different statutes. None of the statutes in those cases contain a provision comparable to section 541(c)(1)(B).

2. There is no conflict regarding the applicability under SIPA section 78fff(b), of substantive, as well as procedural, provisions of the Bankruptcy Code to SIPA proceedings. The two cases relied upon by NUFIC present no genuine conflict and are distinguishable. Neither one addressed the substantive versus procedural distinction made here, and both construed an early version of section 78fff(b). Since then, the language of section 78fff(b) has been clarified, and both its language and legislative history make clear that the only circumstance in which a Title 11 provision will not apply, is if it is inconsistent with SIPA.

3. Whether or not the insurance agreement should be enforced is significant only to the parties involved, and has no importance beyond the confines of this case. The arguments made by NUFIC, founded as they are on misstatements of the law, the issue, and "facts" not raised by it in any court below, clearly present no issue worthy of review.

ARGUMENT

The underlying adversary proceeding was brought within the context of a liquidation proceeding under SIPA. This Court discussed the nature of a SIPA proceeding in general terms in *SIPC v. Barbour*, 421 U.S. 412, 415-417 (1975). However, in *Barbour*, the Court was not concerned with an actual liquidation proceeding of a bankrupt stockbroker, but rather with the question of whether a private right of action existed to compel SIPC to commence such a proceeding. Because an understanding of the nature of the proceeding is critical to a proper resolution of the petition in this case, the history of SIPA, as well as its purposes and relevant provisions, are examined briefly below. That examination reveals that at bottom, the SIPA proceeding is no more than an ordinary bankruptcy liquidation case, with special customer protection features superimposed on it.

Nature of a SIPA Proceeding: Its History and Purposes

Prior to 1938, customers of a bankrupt stockbroker were considered as general creditors if they could not reclaim

cash or securities which they could trace into the broker's possession. *Duel v. Hollins*, 241 U.S. 523, 527-29 (1916). Because serious inequities could and did result from this method of reclaiming, Congress enacted section 60(e) of the Bankruptcy Act in 1938.

A. Section 60(e) of the Bankruptcy Act

Section 60(e) of the former Bankruptcy Act, 11 U.S.C. §96(e) (repealed 1979), permitted "cash customers," as defined therein, to reclaim fully paid securities which were "specifically identifiable" as their property. 11 U.S.C. §96(e)(4) (repealed 1979). Otherwise, customers' cash, securities or property of a similar character generally constituted a "single and separate fund" to be applied in satisfaction of customers' claims on a *pro rata* basis, subject only to prior payment of certain administrative expenses. 11 U.S.C. §96(e)(2) (repealed 1979). As for the unpaid balance of their net equities, customers shared with general creditors in the general estate. A more detailed discussion of section 60(e) is contained in 3 *Collier on Bankruptcy*, ¶¶60.71-60.76 (14th ed. 1977).

Because of the usually inadequate single and separate fund, section 60(e) did not prevent customer losses. Customer exposure mounted when the rate of stockbroker failures accelerated in the 1960s. Congress responded to the crisis by enacting SIPA. S. Rep. No. 1218, 91st Cong., 2d Sess. 4 (1970) ("S. Rep. No. 1218"). *See also* H.R. Rep. No. 1613, 91st Cong., 2d Sess. 1 (1970) ("H.R. Rep. No. 1613"), *reprinted in* 1970 U.S. CODE CONG. & ADM. NEWS at 5255; *SIPC v. Barbour*, *supra*, 421 U.S. at 415.

B. SIPA

With some adjustments, SIPA expressly continued the substantive scheme of section 60(e).[1] The major impact of SIPA on customer recoveries was to reduce losses by providing a limited back-up of the single and separate fund through SIPC funds. In essence, SIPA improved "collectability" while adhering to the section 60(e) philosophy of

[1] S. Rep. No. 1218 at 11; H.R. Rep. No. 1613 at 1.

according customers limited preferential rights based on their actual securities and cash positions entrusted to the broker.

In 1978, SIPA was amended to provide greater flexibility to SIPC in satisfying customer claims in an expeditious fashion.[2] The essential elements of a SIPA proceeding remained unchanged.

C. The SIPC Fund

SIPA requires SIPC to establish a fund via assessments upon its members. §78ddd(a)(1). If SIPC's funds should become inadequate, SIPA authorizes a borrowing against the U.S. Treasury of up to one billion dollars. §78ddd(f)-(h). These resources are available for the satisfaction of customer claims within certain limits.

D. Use of SIPC Funds to Satisfy Customer Claims

SIPA requires the distribution of "a quasi-public fund." *SEC v. Packer, Wilbur & Co.*, 498 F.2d 978, 980 (2d Cir. 1974). "SIPA was not designed to provide full protection to all victims of a brokerage collapse. Its purpose was to extend relief to certain classes of customers." *Id.* at 983.

Under section 78fff-3(a), SIPC is authorized to advance to the trustee, in order to satisfy net equity claims of customers, up to $500,000 per customer of which no more than $100,000 may be used to satisfy a claim which is for cash rather than for securities. Regardless of the assets of the failed firm, each eligible customer with a valid claim is assured of satisfaction within the limits indicated. However, SIPA does not attempt to make all customers whole and SIPC's role is carefully delineated. It contemplates that customers' claims will be satisfied to the maximum extent possible from the assets of the defunct member firm. Thus, customers share on a *pro rata* basis in any fund of customer property and any general estate. SIPA

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[2] SIPA has been amended by Pub. L. No. 95-283, 92 Stat. 249 (1978); Pub. L. No. 95-598, 92 Stat. 2549 (1978); Pub. L. No. 96-433, 94 Stat. 1855 (1980); and Pub. L. No. 97-303, 96 Stat. 1409 (1982).

§78fff-2(c)(1). SIPC's funds supplement those assets within the limits and in the manner provided by the statute. The availability of SIPC's funds does not lessen the burden of customer claims on the estate or its general creditors. To the extent of its advances, SIPC is subrogated to the claims of such customers. SIPA §78fff-3(a). *See SIPC v. Associated Underwriters, Inc.*,423 F.Supp. 168, 170-173 (D. Utah 1975).

E. Bankruptcy Nature of a SIPA Proceeding

Except for the fact that the statutory protection is not "insurance," *SIPC v. Associated Underwriters, Inc., supra,* 423 F.Supp. at 171, 173, it is useful to consider SIPA, as one court has, as an "engraftment of insurance provisions upon the preexisting Section 60(e) bankruptcy provisions applicable to stockbrokers. . . ." *SEC v. Aberdeen Securities Co.*, 480 F.2d 1121, 1123 (3d Cir.), *cert. den. sub nom., Seligsohn v. SEC*, 414 U.S. 1111 (1973). Thus, notwithstanding the special protection afforded customers, a proceeding under SIPA essentially is a bankruptcy liquidation. See, *e.g., SIPC v. Ambassador Church Finance/Development Group, Inc.*, 788 F.2d 1208, 1210 (6th Cir.), *cert. den. sub nom., Pine Street Baptist Church v. SIPC*, 479 U.S. 850 (1986); *SEC v. Albert & Maguire Sec. Co.*, 560 F.2d 569, 572 (3d Cir. 1977); *Exchange National Bank v. Wyatt*, 517 F.2d 453, 457-459 (2d Cir. 1975). Indeed, one of the stated goals of the proceeding is "to liquidate the business of the debtor." SIPA §78fff(a)(4). If the court grants the application by SIPC to commence a SIPA proceeding, it appoints a trustee to administer the liquidation and removes the proceeding to the bankruptcy court for that district. §§78eee(b)(3) and (b)(4). To the extent consistent with SIPA, the SIPA proceeding is to "be conducted in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7" of the Bankruptcy Code. §78fff(b).

As discussed in greater detail, *infra,* because the SIPA proceeding effectively is a bankruptcy proceeding, it looks not only to the disposition of claims of customers, but also

to the claims of general creditors. The trustee is responsible not only to customers but to the entire bankruptcy estate and all of its creditors.

I. BECAUSE THE THRIFT AND BANK CASES DO NOT INVOLVE THE BANKRUPTCY CODE, THERE IS NO CONFLICT.

NUFIC's petition contains many misstatements, only one of which is its misstatement of the issue. Whether or not the federal government selectively may invalidate a provision of a government-approved fidelity bond which it requires of a company subject to its regulation and which has been issued to that company is not a question presented under the facts of this case. Cert. Pet. at 3.[3] SIPC is "not an agency or establishment of the United States Government." SIPA §78ccc(a)(1)(A). Moreover, as discussed *infra*, the bond was not required by SIPA, and SIPC had no authority to, and in fact, did not, negotiate, adopt, or approve of, the termination clause. In view of the foregoing, how courts have answered the question framed by NUFIC is unimportant. What is important is that every court that has considered the question which *is* at hand, namely, whether 11 U.S.C. section 541(c)(1)(B) invalidates the termination clause of a fidelity bond issued to a debtor in a SIPA proceeding, has answered it in the affirmative. Those courts have included the bankruptcy and district courts, and the court of appeals in the instant GSC case, as well as the Bankruptcy and District Courts for the Middle District of North Carolina in another SIPA case.[4]

Notwithstanding the foregoing, in an effort to create a conflict where none exists, NUFIC relies upon three circuit

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[3] References hereinafter to NUFIC's Petition for Writ of Certiorari shall be to "Cert. Pet."

[4] *In re Waddell Jenmar Securities, Inc. (SIPC, Trustee v. NUFIC)*, Case No. A-89-0068, Adv. Pro. No. 90-2149 (Bankr. M.D.N.C. Feb. 18, 1992), *affirmed* (M.D.N.C. Aug. 12, 1992). NUFIC has appealed the decision of the district court. *In re Waddell Jenmar Securities, Inc. (SIPC, Trustee v. NUFIC)*, No. 92-2158 (4th Cir.).

court decisions ("the thrift and bank cases") which it asserts are at odds with the decision of the Eleventh Circuit. Ultimately, those cases, which involve different industries and facts, are irrelevant because they involve different statutes.

1. The Cases Relied Upon by NUFIC Are Irrelevant.

Although NUFIC attempts to draw parallels between the GSC and thrift and bank cases, it omits one critical factor that clearly sets them apart. Contrary to the situation at hand, section 541(c)(1)(B) of the Bankruptcy Code did not apply in any of the cases cited by NUFIC. Two of the cases involved savings and loan associations ("S&Ls") as to which the Federal Home Loan Bank Board ("FHLB") had appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") conservator or receiver. *California Union Insurance Co. v. American Diversified Savings Bank*, 948 F.2d 556 (9th Cir. 1991), and *Sharp v. FSLIC*, 858 F.2d 1042, 1043 (5th Cir. 1988) ("*Sharp*"). Under 12 U.S.C. section 1464(d)(6)(A) and (B) (1988), and 12 C.F.R. sections 547.2 and .3 (1988), the FHLB had exclusive jurisdiction and power to appoint the FSLIC as receiver or conservator for an S&L "without requirement of notice, hearing, or other action." In short, an S&L would be placed in conservatorship without reference to any bankruptcy proceeding. Likewise, in *FDIC v. Aetna Cas. and Sur. Co.*, 903 F.2d 1073, 1074 (6th Cir. 1990), the Federal Deposit Insurance Corporation ("FDIC") was appointed receiver for a bank by the Tennessee Commissioner of Banking. See 12 U.S.C. §1821(c) (1989). In the cases cited by NUFIC, neither the bank nor the S&Ls were in liquidation under Title 11. For that matter, they could not have been because banks and thrifts, including S&Ls, may not be debtors under Title 11. See 11 U.S.C. §109(b)(2) (1992). As provided in the legislative history of the Bankruptcy Reform Act of 1978, and as NUFIC concedes, "[b]anking institutions . . . are excluded from liquidation under the bankruptcy laws because they are bodies for which alternate provision is made for their liquidation under various State or Federal regulatory laws." S. Rep.

No. 989, 95th Cong., 2d Sess. at 31 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADM. NEWS 5817. See Cert. Pet. at 18 ("It is true that FDIC/FSLIC liquidation proceedings do not rely on the provisions of the bankruptcy code."). Accordingly, section 541(c)(1)(B) has no place in a bank or thrift liquidation.

In contrast, and as discussed *infra*, section 541(c)(1)(B) applies to SIPA proceedings by reason of SIPA section 78fff(b). Because section 541(c)(1)(B) governs the liquidation of stockbrokers but not of banks and thrifts, the cases cited by NUFIC are irrelevant, and do not conflict with the decision of the Eleventh Circuit.[5]

2. No Basis Exists to Apply Banking Law to the Liquidation of a Securities Broker-Dealer.

A. NUFIC's Erroneous Assertions Are Untimely Raised.

In the Bankruptcy Court, NUFIC relied upon the district court decision in *Sharp* and on another thrift case not cited by it here, for the limited proposition that termination clauses in those cases had been upheld. NUFIC Mem. of Law, certified as served on Sept. 19, 1988, at 8-10. On appeal to the District Court and the Eleventh Circuit, over the Trustee's and SIPC's objections as to timeliness (see Joint Brief at 25, n.13), it added a new argument, namely, that SIPC should not be allowed "to substantially impair the express terms of a bargained for contract between the insurer and the insured," because by

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[5] The fact that Congress has articulated a different policy in the banking area is evident from its enactment of 12 U.S.C. section 1821(e)(12)(A). Under that section, a bank conservator or receiver is prohibited from enforcing a fidelity bond. See *FDIC v. Aetna Cas. and Sur. Co.*, *supra*, 903 F.2d at 1078. Thus, while Congress has expressed its intent in 11 U.S.C. section 541(c)(1)(B), that trustees recover under such bonds in stockbroker liquidations, it has expressed a different intent under 12 U.S.C. section 1821(e)(12)(A), by denying their enforcement to bank receivers or conservators. For a recent discussion of the differences between the FDIC and SIPC, see GAO, *The Regulatory Framework Has Minimized SIPC's Losses* (Sept. 1992) at 15-16.

analogy to *Sharp*, SIPC allegedly required its members to obtain the bond in the first place, and "could require its members to purchase an additional discovery period available to a SIPC Trustee in the event of a takeover." District Court Brief of NUFIC, at 16. In its certiorari petition, it raises yet another erroneous argument, namely, that the termination clause should be enforced because SIPC "accepted this standard [fidelity] bond as drafted." Cert. Pet. at 17.

This Court should decline to consider the latter arguments because they either were never raised or were not timely raised below. In particular, NUFIC's belated and false assertion as to SIPC's supposed approval of the termination clause underscores why review is inappropriate. Whether or not SIPC approved of the termination clause raises questions of fact. Yet, NUFIC introduced no evidence, and the Trustee and SIPC countered with none because the question was never raised. As observed in *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), there are sound reasons for a refusal to consider such issues:

> It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556 . . . (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

See *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Taylor v. Freeland & Kronz*, ___ U.S. ___, 112 S. Ct. 1644, 1649 (1992).

At the trial level, NUFIC had ample opportunity to make the arguments advanced only on appeal, and to offer evidence, if any, in support thereof. It did not. To the detriment of the debtor's creditors, the Trustee and SIPC,

NUFIC should not be indulged in its assertion of bogus issues at this late juncture.

B. The Statutory Schemes Administered by the FDIC and SIPC Are Distinct.

Even assuming, *arguendo*, that no question of timeliness existed, NUFIC has not shown that the thrift and bank cases apply. Contrary to NUFIC's contention, and unlike the FDIC,[6] SIPC has no statutory authority to require issuance of a bond. Indeed, the bond in question was required under National Association of Securities Dealers ("NASD") and not SIPC rules. Moreover, SIPC did not consent, as a matter of law or fact, to the termination clause. Had the question been raised below, SIPC would have shown that, in fact, it actively opposed it.

i. The Powers of the FDIC Are Broader Than Those of SIPC.

To be sure, predecessor bills to SIPA would have patterned SIPC after the FDIC. See, *e.g.*, 115 Cong. Rec. 15165-15170 (June 9, 1969) (remarks of Sen. Muskie). The kind of organization contemplated under those proposals and its responsibilities were summarized as follows:

> This is the key to understanding the functions and philosophy of the Federal guaranty system. Because a weakening of public confidence in the safety of deposits cannot be allowed to develop at the outset, FDIC and FSLIC consider the prevention of failures the best safeguard. In this regard, these bodies are neither more nor less than regulatory agencies .... They accomplish their regulatory objectives by examining member institutions to ensure financial soundness and by administering a constantly evolving network of laws, rules and regulations that prescribe,

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[6] In pertinent part, under 12 U.S.C. section 1828(e), the FDIC "may require any insured depository institution to provide protection and indemnity against burglary, defalcation, and other similar insurable losses." See *supra*, n.5.

> often in minutest detail, the standards under which members will conduct their day-to-day operations.

Hearings on S. 2348, S. 3988, and S. 3989 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. ("Hearings on S. 2348") 212 (April 17, 1970) (testimony of Mr. Gardiner, Chairman, Leg. Comm., Assoc. of Stock Exchange Firms). However, as illustrated below, this approach received opposition:

> Finally, let me comment briefly on the FDIC, which has been proposed as a model for our industry. In the words of . . . the retiring head of the FDIC, that body "should not be compared to the insurance functions of a private insurer." It serves, instead, principally as a regulatory agency brought into being in 1933 to minimize bank failures. . . .
>
> Models chosen from one field of activity rarely fit exactly the needs of another field. I do not think the pattern of the FDIC fits the securities industry very well.

Hearings on S. 2348 at 29 (April 16, 1970) (statement of Mr. Regan, President, Merrill, Lynch, Pierce, Fenner & Smith). Ultimately, the FDIC approach was rejected. *Cf.*, *SEC v. Morgan, Kennedy & Co.*, 533 F.2d 1314, 1318 (2d Cir.), *cert. den.*, 426 U.S. 936 (1976) ("SIPA and [the Federal Deposit Insurance Act ("FDIA")] are independent statutory schemes, enacted to serve the unique needs of the banking and securities industries, respectively. The Congress recognized this when it rejected several early versions of the SIPA bill which were patterned on FDIA. . . .").

The statute that finally emerged "neither created a new regulatory organization nor an additional layer of regulatory authority." *SIPC and Customer Protection* (2d ed. April 1986) at 2.[7] The role that SIPC would have is aptly

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[7] NUFIC asserts that even SIPC has analogized SIPC to the FDIC. Cert. Pet. at 9-10. In support of that assertion, it relies upon language

described as follows:

> Well, SIPC is a new federally chartered corporation, but essentially would be a vehicle to collect funds and to pay out funds when a broker-dealer is in financial difficulties. All of the regulatory power that is in the self-regulatory authorities would continue.

Hearings on S. 2348 at 231 (June 18, 1970) (statement of Mr. DeNunzio, Vice Pres. of the Bd. of Governors, N.Y. Stock Exchange). SIPC was to function within the established framework of broker-dealer self-regulation. H. R. Rep. No. 1613, 91st Cong., 2d Sess. 11-12 (1970) ("H. R. Rep. No. 1613"). That framework is considered below.

ii. The Relationship of SIPC to the SEC and NASD

SIPA is only one aspect of an extensive network of laws that apply to securities broker-dealers. Within that structure, SIPC's role and jurisdiction are narrow and intensely specialized—relating only to the liquidation of its members under SIPA. SIPC has no regulatory authority. That responsibility is exercised, in the first instance, by the SEC, and in the second, by the self-regulatory organizations or "SROs."[8] The following excerpt offers some insight into the regulatory process:

> The federal securities laws, primarily through the [1934 Act], provide a comprehensive scheme of regulation over "brokers" and "dealers" in corporate and other business entity securities. This regulation includes registration with the [SEC], compliance with the SEC bookkeeping and reporting rules, as well as

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in the *Customer Protection* publication to the effect that a draft bill of SIPA would have created an organization with a role in the securities industry comparable to that of the FDIC and similar organizations. However, the quotation, which is only partial, is misleading. Ensuing language makes clear that the proposal was rejected inasmuch as the existing self-regulatory structure was retained, and no new regulatory organization was created. *SIPC and Customer Protection*, *supra*, at 1-2.

[8] SROs include, among others, national securities exchanges and registered securities associations such as the NASD. 15 U.S.C. §78c(a)(26).

> with its financial responsibility requirements, and adherence to a complex pattern of specialized antifraud standards. The major part of this regulatory system is administered directly by the SEC, which maintains a continuing surveillance over broker-dealer activities. * * * The [1934 Act] supplements direct SEC regulation with a statutory mandate for industry self-regulation by the national securities exchanges and securities associations registered with the SEC. The registered securities exchanges include the New York, American, and various regional exchanges, but only one securities association, the [NASD] is registered with the SEC.

N. Wolfson, *Regulation of Brokers, Dealers and Securities Markets*, ¶1.01 at p. 1-2 (1977).

With certain narrow exceptions, every securities broker or dealer must be registered with the SEC. By virtue of that registration under section 15(b) of the 1934 Act, 15 U.S.C. §78o(b), brokers or dealers automatically are members of SIPC. SIPA §78ccc(a)(2)(A). To the extent that they do not effect transactions only on a national securities exchange, they also must be registered with the NASD.[9] 15 U.S.C. §78o(b)(8). Thus, in general, every SIPC member is not only registered with the SEC, but is, in addition, a member of an SRO.

The SEC and SROs play an important role in furthering the objectives of SIPA. A principal goal under SIPA is to reinforce confidence in the marketplace, by providing for the protection of customers in the event of a stockbroker

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[9] Under the supervision of the SEC, the NASD is authorized under 15 U.S.C. section 78o-3, "to promulgate rules designed to prevent fraudulent and manipulative practices; to promote equitable principles of trade; to safeguard against unreasonable profits and charges; and generally to protect investors and the public interest. . . ." *United States v. NASD*, 422 U.S. 694, 702 n.6 (1975). *See First Jersey Securities, Inc. v. Bergen*, 605 F.2d 690, 692-693 (3d Cir. 1979), *cert. den.*, 444 U.S. 1074 (1980); *Austin Mun. Securities v. NASD*, 757 F.2d 676, 679-681 (5th Cir. 1985).

failure. Of equal if not greater importance is its goal of eliminating the risks that might lead to such a failure by "achiev[ing] a general upgrading of financial responsibility requirements." S. Rep. No. 1218, 91st Cong., 2d Sess. 4 (1970). See *In re Investors Center, Inc.*, 129 B.R. 339, 341 (Bankr. E.D.N.Y. 1991).

Under SIPA, Congress sought to accomplish the latter objective by requiring the SEC to adopt financial responsibility rules, and by giving the SEC and SROs the power to monitor compliance with them. Thus, section 7(d) of SIPA, 15 U.S.C. §78o(c)(3) (1970), amended the 1934 Act to confer on the Commission "rulemaking power with respect to financial responsibility and related practices of brokers and dealers." H. R. Rep. No. 1613 at 22-23.[10] *See* 116 Cong. Rec. 40868 (Dec. 10, 1970) (remarks of Mr. Muskie). And, it imposed on the SEC and SROs the duty to examine or inspect members for compliance with those rules. SIPA §78iii(c). The oversight and investigatory powers of the SEC and SROs enable them to carry out their responsibility with respect to the second objective of SIPA. Thus, if they are aware of facts leading them to believe that a stockbroker is in or approaching financial difficulty, they must notify SIPC. §78eee(a)(1). Based upon that information, SIPC determines whether commencement of a proceeding is warranted. §78eee(a)(3).

iii. The Bond Was Required Pursuant to NASD Rule, and Not SIPA.

GSC was required to obtain the fidelity bond in question pursuant to Article III, section 32 of the NASD Rules of Fair Practice, and App. C thereto. See Cert. Pet. at 43a-

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[10] SIPA section 7(d), contained in the Statutory Appendix hereto (SA-1), amended section 15(c)(3) of the 1934 Act, 15 U.S.C. §78o(c)(3) (1970). In 1975, section 15(c)(3) was further amended to require the SEC to adopt minimum financial responsibility requirements no later than September 1, 1975. Pub. L. No. 94-29, 89 Stat. 126 (1975).

For purposes of SIPA, "financial responsibility rules" include various SEC and SRO rules relating to the protection of funds or securities. 17 C.F.R. §240.3a40-1 (1992).

46a. Since SIPC has no regulatory authority, NUFIC's conclusion that "the rules of the [SROs] are imposed, by SIPA, directly on all SIPC members just as surely as if those rules had been promulgated by SIPC itself" is, at the very least, puzzling. Cert. Pet. at 7. By attributing the rules of the NASD to SIPC and thereby concluding that *SIPC* required issuance of the bond, Cert. Pet. at 10, NUFIC plainly ignores the fact that SIPC was not patterned after the FDIC. Although it works closely with the SEC and the self-regulators, it itself has no comparable authority. Thus, it does not set financial responsibility requirements for its members; it has no power to investigate whether such requirements are being met; and it has no authority to compel its members to meet such requirements.

Nevertheless, relying upon an interpretation of SIPA section 78iii(c) that defies not only the plain meaning and legislative history of the provision, but logic, NUFIC asserts that the section supports its conclusion that the bond was required under SIPA. Cert. Pet. at 7. In part, the section provides:

> The [SRO] of which a member of SIPC is a member or in which it is a participant shall inspect or examine such member for compliance with applicable financial responsibility rules. . . .

The section also specifies the SEC as the examining authority under certain circumstances. *Id.* Obviously, section 78iii(c) does not impose the rules of the NASD on SIPC members. Those rules already apply to brokers or dealers that are members of the NASD under other authority. See NASD Rules of Fair Practice, Art. I, §5(a) ("these Rules of Fair Practice shall apply to all members. . . ."), and Art. II, §1(c) ("member" includes, among others, any corporation admitted to membership in the NASD), *reprinted in* NASD Manual-Rules of Fair Practice (CCH) ¶¶2005 and 2101, at pp. 2011 and 2012. Instead, section 78iii(c) simply designates the SEC and SROs as examining authorities to enable them to carry out their responsibility of notifying

SIPC when a broker or dealer is in financial trouble. SIPA §78eee(a)(1). See H. R. Rep. No. 1613 at 23. NUFIC's attempt to attribute a more expansive authority to SIPC simply has no basis in the law.

iv. SIPC Never Approved of the Termination Clause.

The attempt also fails as a matter of fact. In a last minute effort not made before any lower court, see *supra*, NUFIC asserts that SIPC "concealed" from the Eleventh Circuit its knowledge that the NASD adopted the bond requirement "at SIPC's prompting and in full consultation with SIPC pursuant to §78iii(e)." Cert. Pet. at 12. In fact, SIPC practiced no deceit before the Eleventh Circuit. Instead, it is petitioner's conduct before this Court that is in question.

In the first place, SIPA section 78iii(e) is not at issue. That provision requires SIPC to "consult and cooperate" with the SROs toward the development of early warning and surveillance procedures that will enable the SRO to detect whether a firm is in financial trouble. See H. R. Rep. No. 1613 at 23. Plainly, a bond requirement is not encompassed by the section. Second, SIPC's position and conduct with respect to stockbroker fidelity bonds—from the adoption of the requirement by the NASD through SIPC's support for the Trustee's position in this case—have been unwaivering. At all times, where the claim is valid, SIPC has supported recovery under the bond, whether or not the firm is in SIPA liquidation.

Because the availability of a fidelity bond may have a direct impact on the failure of a firm, SIPC did express its concern to the SEC and the NASD that many brokers did not carry bonds. First Annual Report of SIPC at 32 (1971). Cert. Pet. at 10. After all, a bond may enable a broker to avoid liquidation. And, even if the broker fails, it offers a means of recovery for customers whose claims exceed the monetary limits of SIPA protection, and for general creditors because their claims cannot be satisfied from SIPC funds. See SIPA §78fff-3(a). However, even

assuming *arguendo* that the question were relevant, SIPC never approved of the GSC bond. Cert. Pet. at 12.

NUFIC does not allege that SIPC actually negotiated the standard bond.[11] It merely contends that SIPC "had full knowledge that the *SROs and the Surety Association of America* ["SAA"] worked together to develop the required bond" (emphasis added). *Id.* at 11. In any event, the standard bond, as it existed in the early 1970s when SIPC noted its approval of the adoption by the NASD of a proposed bonding requirement, would not have been objectionable to SIPC because it permitted a trustee to make recovery under it. Yet, NUFIC attempts to suggest otherwise—one, by omitting key language from its citation of a SIPC annual report; and two, by failing to bring to this Court's attention the fact that the 1970s bond allowed recovery.

In citing a passage from SIPC's 1972 Annual Report, petitioner coyly omits from it, a key sentence showing that SIPC perceived the bond as providing protection that was in addition to, and not in lieu of, the SIPA protection. The omitted sentence (in italics) is as follows:

> [W]e are pleased to note that the membership of the NASD recently approved a proposal which authorizes its Board of Governors to require that NASD members, who are members of SIPC . . . obtain such bonds. *The proposal would supplement the protections provided by SIPC by covering losses sustained by forgery, misplacement of securities and fraudulent trading . . . .*

SIPC Second Annual Report (1972), at 37. *Cf.*, Cert. Pet. at 11.

SIPA does not protect losses based on forgery, misplacement of securities, or fraud. *SEC v. S.J. Salmon & Co.*, 375 F.Supp. 867, 870-71 (S.D.N.Y. 1974); *In re Bell & Beckwith*, 124 B.R. 35, 36 (Bankr. N.D. Ohio 1990); *In*

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[11] When adopted, the NASD rule required that the bond be "in a form substantially similar to the standard form of Brokers Blanket Bond promulgated by the SAA." Cert. Pet. at 44a.

re MV Securities, Inc., 48 B.R. 156, 160 (Bankr. S.D.N.Y. 1985). It is impossible that the fidelity bond could "supplement" the SIPC protection by insuring such losses unless recovery could be had even after the broker was in liquidation. It is apparent from the omitted language that SIPC did not regard the bond as an *alternative* to SIPA protection, as NUFIC implies, but as an addition to it. Of necessity, a trustee could assert a claim.

NUFIC also conveniently neglects to apprise the Court that while the standard fidelity bond which was in effect from 1970 until 1987, provided for termination upon appointment of a liquidator, it also authorized the liquidator to purchase an additional period within which to discover any loss, and thus, to assert a claim. In part, the bond specified:

> RIGHTS AFTER TERMINATION OR CANCELATION
>
> Section 12. At any time prior to the termination or cancelation of this bond as an entirety, whether by the Insured or the Underwriter, *the Insured may give to the Underwriter notice that it desires under this bond an additional period of twelve months within which to discover loss* sustained by the Insured prior to the effective date of such termination or cancelation and shall pay an additional premium therefor. *If this bond is terminated or canceled as an entirety by reason of the taking over of the insured by a . . ., liquidator, such . . . liquidator . . . shall have the rights of the Insured . . .* provided that such rights are exercised by notice to the Underwriter within thirty days after such insured is taken over by such . . . liquidator . . . and provided, further, that such Insured has not previously exercised such rights. *Upon receipt of such notice* from the insured or *from such . . . liquidator . . ., the Underwriter shall give its written consent thereto. . . .* [emphasis added].

L. Barbagallo, App. I to *The Financial Institution Bond, Standard Form 14—Revision of the Stockbrokers Blanket Bond, Standard Form 14—Oct. 1987* (ABA Tort and In-

surance Practice Section ("TIPS") Annual Meeting 1988) ("Barbagallo, *Standard Form 14*"). See *id.* at 1 (referring in 1988 to the "revision of the Stockbrokers Blanket Bond, Standard Form 14, last revised in September 1970"). See also J. Knoll, *Special Provisions of Brokers, Insurance Companies and [S & L] Blanket Bonds, reprinted in Financial Institution Bonds* (ABA TIPS 1989) at 238 (referring to the "Financial Institution Bond, Standard Form No. 14 (October, 1987 revision)" which "replaced the previous Stockbrokers Blanket Bond (1970 revision) of the same number.")[12]

Thus, at the time that SIPC issued its 1971 and 1972 annual reports, the bond clearly allowed a trustee to recover under it. NUFIC's suggestion that the reports show that SIPC approved of the GSC termination clause and concealed that information from the Eleventh Circuit is as false as it is reprehensible. Moreover, although the standard bond was revised in 1987 to include the termination clause as reflected in the GSC bond, Barbagallo, *Standard Form 14* at App. II, it is not clear whether the revision occurred before or after the bond was issued to the debtor that year. NUFIC offers no factual support for its assertion that SIPC approved the standard bond after its revision in 1987. And indeed it cannot, since none exists.

The foregoing discussion reveals why review is inappropriate. NUFIC has advanced *no* valid authority for its contention that the thrift and bank cases should be deemed to apply. Plainly, the statutory schemes creating the FDIC and SIPC have vested them with different degrees of power. SIPC had no authority, as a matter of law, to require issuance of the bond. And even assuming, *ar-*

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[12] Very recently, SIPC staff has learned that the SAA approved a rider, effective December 1980, for use with the standard bond. In pertinent part, the rider terminated the bond upon appointment of a liquidator and provided for no purchase of an additional discovery period. However, the standard bond itself was not modified until 1987. And, in issuing its reports in the very early 1970s, SIPC could not have known of the rider that would be approved years later.

guendo, that the question were relevant[13] and had been timely raised, it never approved of the termination clause as a matter of fact. In that regard, whether the meager evidence which NUFIC now relies upon to attempt to establish SIPC's alleged approval is adequate presents no question worthy of review. *Cf.*, *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("[we do not grant a certiorari to review evidence and discuss specific facts."). The thrift and bank cases are based on a different statutory scheme, and hence, are inapplicable and not in conflict with the decision of the Eleventh Circuit.

v. NUFIC Is Held to Know the Law.

Finally, NUFIC asserts that it is inequitable for the Trustee and SIPC selectively to invalidate provisions of the bond. Cert. Pet. at 14, 19. However, the only potential unfairness is to creditors of the firm in SIPA liquidation. NUFIC conceded in the Court of Appeals that section 541(c)(1)(B) would invalidate the clause in an ordinary bankruptcy liquidation of a stockbroker. See NUFIC Appellate Brief at 16. There is no reason for creditors to fare less well simply because the broker is in SIPA liquidation. Even if the termination clause is not enforced, there is no unfairness to NUFIC. Both section 541(c)(1)(B) and SIPA section 78fff(b) existed at the time that NUFIC contracted with GSC. Hence, NUFIC measured the risk of issuing the bond, and determined that the benefit to it outweighed the risk.

Section 541(c)(1)(B) was enacted as part of the Bankruptcy Reform Act of 1978. Pub. L. No. 95-598, 92 Stat.

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[13] The question is irrelevant because SIPC had no statutory authority either to require a bond or to approve its terms. Even assuming, *arguendo*, that SIPC had approved it, that approval would be meaningless. Congress clearly has expressed its intent in 11 U.S.C. section 541(c)(1)(B), made applicable to a SIPA proceeding, that such provisions are invalid. SIPC could not modify the law. *Cf.*, *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947) ("anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.")

2594 (1978). Although no comparable provision existed under the Bankruptcy Act, see 4 *Collier on Bankruptcy*, ¶541.22 at p. 541-113 (15th ed. 1992), section 541(c)(1)(B) had been in effect for nearly ten years, by the time NUFIC issued the bond to GSC in 1987. In undertaking to do business with GSC, NUFIC knew that its transactions would be subject to existing laws. As stated in *In re Prima*, 88 F.2d 785, 788 (7th Cir. 1937):

> All parties to a contract are, of necessity, aware of the existence of, and subject to, the power of Congress to legislate on the subject of bankruptcies. They were and are chargeable with knowledge that their rights and remedies, in case the debtor becomes insolvent and is adjudicated a bankrupt, are affected by existing bankruptcy laws . . . .

See Wright v. Union Central Ins. Co., 304 U.S. 502, 516 (1938); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934); *In re Golden*, 16 B.R. 580, 583 (Bankr. S. D. Fla. 1981). *See also Federal Crop Ins. Corp. v. Merrill*, *supra*, 332 U.S. at 384 ("everyone is charged with knowledge of the United States Statutes at Large"). There is no unfairness to NUFIC and no reason to grant review.

II. THE DECISION THAT SUBSTANTIVE PROVISIONS OF TITLE 11 APPLY IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

Review also is inappropriate because the holding that section 541(c)(1)(B) applies, does not conflict with decisions of the Second and Third Circuit. Cert. Pet. at 22, 24-26. The two cases relied upon by NUFIC are distinguishable. Neither one of them addressed the substantive versus procedural distinction raised in this case, and both construed SIPA section 78fff(c)(1), the 1970 predecessor of section 78fff(b). Since that time, the meaning of the section has been clarified. The language of the current section, and its legislative history, make clear that whether a Bankruptcy Code provision applies to a SIPA proceeding does not depend on whether it is substantive or procedural, as

NUFIC maintains, but solely on whether it is consistent with SIPA. For the reasons discussed below, there is no conflict.

1. The Plain Meaning of Section 78fff(b)

There are two operative requirements under the relevant portion of section 78fff(b). The SIPA liquidation, to the extent consistent with SIPA, must be conducted 1) "in accordance with" and 2) "as though it were being conducted under chapters 1, 3, and 5, and subchapters I and II of chapter 7 of title 11." The Title 11 provisions referred to in section 78fff(b) are *all* of the straight bankruptcy liquidation provisions of the Code, except for the stockbroker and commodity broker provisions. If each clause of section 78fff(b) is to be given effect, as it must, *Petition of Public Nat. Bank of New York*, 278 U.S. 101, 104 (1928) (statute should be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant"), then in order for the liquidation to be conducted "in accordance with" Title 11, section 541(c)(1)(B), contained as it is in chapter 5 of the Code, must be held to apply. Moreover, in order for the SIPA liquidation to be conducted "as though it were being conducted" under the straight bankruptcy provisions of Title 11, the procedures that apply in ordinary bankruptcy must equally be deemed to apply to SIPA liquidations. The only limitation on whether a Title 11 provision applies is not one of procedure versus substance. Instead, as provided in section 78fff(b), it is that the provisions of the Code, procedural and substantive alike, must be consistent with SIPA. A provision is not consistent with SIPA if it "conflicts with an explicit provision" of SIPA or if its application "would substantially impede the fair and effective operation of SIPA without providing significant countervailing benefits." *SIPC v. Charisma Sec. Corp.*, 506 F.2d 1191, 1195 (2d Cir. 1974). See also *SIPC v. Securities Northwest, Inc.*, 573 F.2d 622, 625 (9th Cir. 1978). Section 541(c)(1)(B) does not conflict with any explicit provision of SIPA. Rather, it is the failure to apply it to the case at hand which "would sub-

stantially impede the fair and effective operation of SIPA." *SIPC v. Charisma Sec. Corp., supra,* 506 F.2d at 1195.

2. NUFIC's Interpretation of Section 78fff(b) Limits the Trustee's Powers In a Manner Inconsistent With the Statutory Scheme and Detrimental to Creditors.

A SIPA liquidation contemplates not only satisfaction of customer claims, but the liquidation of the debtor's business, and the satisfaction of claims filed by general creditors. See SIPA §§78fff(a)(4) and 78fff-2(a)(3).[14] To accomplish those ends, the SIPA trustee not only has the unique powers that enable him to perform the special functions of a SIPA liquidation, but also the powers of an ordinary bankruptcy trustee. §78fff-1(a) (SA-2). *See SIPC v. Christian-Paine & Co.*, 755 F.2d 359, 361 (3d Cir. 1985); *Executive Securities Corp. v. Doe*, 702 F.2d 406, 407 (2d Cir. 1983), *cert. den.*, 464 U.S. 818 (1983); *SEC v. Albert & Maguire Sec. Co.*, 560 F.2d 569, 574 (3d Cir. 1977). *See also* 3 *Collier on Bankruptcy*, ¶60.85 at p. 1246 (14th ed. 1977). Practical reasons support the trustee's expansive powers. As observed in *Gold v. Hyman*, [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,043 at pp. 97,657–97,658 (S.D.N.Y. 1975):

> A SIPA trustee was undoubtedly intended by Congress to completely liquidate a brokerage business which had failed—including processing all creditor claims as well as customer claims. Indeed, a SIPA trustee has even more powers in some circumstances than a trustee in bankruptcy. For Congress to have provided otherwise would have been unwise and inefficient. A SIPA trustee knows the situation well by

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[14] The fact that the SIPA trustee completes the entire liquidation of a debtor finds support in 11 U.S.C. section 742. That section authorizes SIPC to seek to have a stockbroker already in bankruptcy, placed in SIPA liquidation, notwithstanding the automatic stay provisions of section 362 of the Code. The filing of the SIPC application operates as a stay of any Title 11 proceeding, and "[i]f SIPC completes the liquidation of the debtor, then the court shall dismiss the case." §742.

> the time customer claims are processed and is obviously the proper person to complete liquidation.

The powers of a SIPA trustee are co-extensive with his duties. In addition to his duties to customers of a debtor, a SIPA trustee is "subject to the same duties as a trustee in a case under chapter 7 of title 11," to the extent consistent with SIPA. §78fff-1(b). As stated in *Matter of Lewellyn*, 26 B.R. 246, 253-54 (Bankr. S.D. Iowa 1982):

> The [SIPA] trustee has certain duties which are separate from his duties under the Bankruptcy Code. These relate to a stockbroker's customers. . . . At the same time, the trustee is a trustee bound by the Bankruptcy Code to perform the duties of a trustee under the provisions of the Bankruptcy Code. . . . The [SIPA] proceeding looks not only to the claims of customers but also the claims of general creditors . . . . This is to say that the trustee's impartiality applies to all creditors and his responsibility is to the entire bankruptcy estate and not to just stockbroker-debtor customers. [Citations omitted].

One of the duties of a chapter 7 trustee is to "collect and reduce to money the property of the estate." 11 U.S.C. §704(1). A consequence of that duty is that in order to maximize the estate for the benefit of creditors, the bankruptcy trustee, as appropriate, must bring suit. As stated in another SIPA case:

> In the absence of liquidation proceedings, any cause of action for damages which accrued to the partnership . . . could have been prosecuted by the partnership in its own name. . . . However, the partnership has been placed into [SIPA] liquidation. When that was done the provisions of 11 U.S.C. §541 became applicable. *See*, 15 U.S.C. §78fff(b). . . .
>
> It is well settled that causes of action which belong to the debtor at the time of the commencement of a case become part of the estate. . . . The Trustee as representative of the estate,. . .is the only entity en-

> titled to pursue such causes of action. [Citations omitted].

In re Bell & Beckwith, 50 B.R. 422, 433 (Bankr. N. D. Ohio 1985). See also *SIPC v. Poirier*, 653 F.Supp. 63, 65-66 (D. Ore. 1986).

It is implausible that Congress would, on the one hand, confer on the SIPA trustee the obligations of a Title 11 trustee, but on the other hand, limit the trustee in his ability to perform those obligations solely because the debtor is in liquidation under SIPA. Were this case initiated under Title 11, a trustee would be able to rely on the anti-termination provisions of the Code. *See, e.g., In re Manning*, 831 F.2d 205, 211 (10th Cir. 1987). If GSC were a brokerage firm in liquidation under subchapter III of chapter 7 of the Code, the Trustee plainly could rely on such provisions. 11 U.S.C. §103(a).[15] Congress intended no different outcome merely because the liquidation is under SIPA. In that regard, nothing in SIPA or the Code supports the ultimate result of NUFIC's position, namely, that creditors in a SIPA liquidation are to be more disadvantaged than their counterparts in ordinary bankruptcy.

It also bears mention that NUFIC's interpretation of section 78fff(b) would undermine the statutory scheme by creating gaps in the administration of the liquidation that would make it impossible to be completed. For example,

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[15] Subchapter III governs the liquidation of broker-dealers that are not in SIPA liquidation, for example, because the broker or dealer, although otherwise bankrupt, is nevertheless able to meet its customer obligations. NUFIC asserts that a SIPA liquidation is so different from one under the Code that the stockbroker liquidation provisions of Title 11 do not even apply. Cert. Pet. at 24. *See* SIPA §78fff(b) (not incorporating subchapter III). Obviously, they would not apply since the aspects of a liquidation unique to broker-dealers, are instead addressed by SIPA. This fully comports with the legislative intent that the provisions of the Code apply to the extent consistent with SIPA. At any rate, NUFIC overlooks the fact that, except for the availability of SIPC's funds, the stockbroker liquidation provisions of Title 11 are nearly identical to those of SIPA.

terms defined in the Code could not be given their statutory meanings; executory contracts could not be deemed rejected if not acted upon within 60 days after the order for relief, 11 U.S.C. §365(d)(1); the trustee's avoidance powers would be substantially curtailed; the trustee would have no claim against the estates of general partners to the extent debts could not be satisfied from a debtor-partnership's assets, §723(c); no determination could be made as to the secured status of any claim, §506(a); or the extent to which any such lien were void, §506(d). Moreover, determining whether a provision of the Code was exclusively "procedural" and not substantive, would complicate further the administration of the liquidation. In short, NUFIC's interpretation creates a liquidation process that differs markedly from the one established by Congress. The fact that such a liquidation process results cuts against the notion that only procedural provisions apply.[16]

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[16] NUFIC contends that because specific substantive sections of the Code already are referred to in various provisions of SIPA, Congress could not have intended non-specifically designated ones to apply. Cert. Pet. at 28. Yet, under that reasoning, procedural provisions would not apply either, and section 78fff(b) would be meaningless, since they too are referred to throughout SIPA. See, *e.g.*, section 78eee(b)(3) (trustee qualifies by filing bond in manner prescribed by section 322); section 78eee(b)(5)(B) (requiring fee applications to conform in form and content with provisions of Title 11); and section 78fff(e) (requiring general estate to be distributed in order provided in section 726 of the Code).

NUFIC also misinterprets SIPC's support of an amendment to section 362(a) of the Code to apply, by its own terms, to SIPA cases. Cert. Pet. at 28. SIPC supported the amendment not because section 362(a) would not have applied under section 78fff(b), but because it would have applied too late. Under section 78fff(b), the provisions of Title 11 apply to a SIPA "liquidation proceeding". But the liquidation proceeding does not begin until a trustee is appointed. SIPA §78*lll*(10). Thus, section 362(a) which, in ordinary bankruptcy, imposes certain stays upon the mere filing of the bankruptcy petition, would not have applied to a SIPA case at the most critical time, *i.e.*, when SIPC files the application for a protective decree.

3. Nothing in the Legislative History of Section 78fff(b) Supports the Conclusion that Only Procedural Provisions Apply.

Even assuming, *arguendo*, that the meaning of section 78fff(b) is not clear, and that it therefore is necessary to examine the legislative history, *Blum v. Stenson*, 465 U.S. 886, 896 (1984), NUFIC's position is still untenable.

The predecessor of section 78fff(b) under the 1970 original version of SIPA was section 78fff(c)(1) (SA-3). While providing that no reorganization plan was to be formulated, the section incorporated into the SIPA proceeding, to the extent consistent with SIPA, the reorganization provisions of Chapter X, as well as the liquidation provisions of Chapters I through VII, of the Bankruptcy Act. The difficulties posed by the attempted reconciliation of provisions with diverse goals, that is, reorganization versus liquidation, among other reasons, led to a revision of section 78fff(c)(1) in 1978.

The process of examining SIPA, with a view toward amending it, had begun a few years earlier. In 1974, SIPC created a Special Task Force to study possible amendments to SIPA—including section 78fff(c)(1). A report was prepared by the Task Force and transmitted to Congress in connection with its consideration of amendments to SIPA that began in 1975, and resumed in 1977. H. R. Rep. No. 746, 95th Cong., 1st Sess. at 35 (1977) ("H. R. Rep. No. 746"). It is plain from a review of the report that the Task Force understood full well that both procedural and substantive provisions of the Bankruptcy Act applied to SIPA proceedings. Thus, with respect to section 78fff(c)(1), the Task Force recommended that the wholesale incorporation of the Bankruptcy Act into SIPA be eliminated, and that the "points of *substantive* bankruptcy law and procedure" either be set forth in SIPA or incorporated by reference to specific provisions of the Act. Its recommendation was based on its perception that the incorporation of both reorganization and liquidation provisions had caused confusion among SIPA trustees and their

counsel as to which applied. The Task Force also noted that a new "Federal Bankruptcy Act" was under consideration by Congress which, if adopted, might "substantially change bankruptcy procedure and administration, as well as certain *substantive* rights." Any changes in the Bankruptcy Act, "not inconsistent with SIPA," would apply automatically under SIPA. *Hearings on H.R. 8331 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. at 137-138 (Aug. 1, 1977) (Report to the SIPC Board of Directors of the Special Task Force to Consider Possible Amendments to SIPA of 1970) (emphasis added).

As amended in 1978, section 78fff(c)(1) became section 78fff(b). The Task Force recommendation was followed, to the extent that section 78fff(b) "eliminated the wholesale incorporation of chapter X of the Bankruptcy Act." S. Rep. No. 763, 95th Cong., 2d Sess. at 11 (1978), *reprinted in* 1978 U. S. CODE CONG. & ADM. NEWS 774. SIPA proceedings were made "subject to those Bankruptcy Act provisions relating to ordinary bankruptcy." *Id.* Thus, section 78fff(b) provided that to the extent consistent with SIPA, the liquidation proceeding was to be conducted "in accordance with, and as though it were being conducted under, the Bankruptcy Act. . . ." Pub. L. No. 95-283, 92 Stat. 259 (1978).

Additional changes were made to section 78fff(b) that same year, when the Bankruptcy Reform Act of 1978 was adopted. To conform it technically to the new law, section 78fff(b) was amended to its current form, incorporating specifically the liquidation provisions under "chapters 1, 3, 5 and subchapters I and II of chapter 7 of title 11". Pub. L. No. 95-598, 92 Stat. 2675 (1978).

Nothing in the legislative history of section 78fff(b) supports the interpretation advanced by NUFIC. The sole limitation on the applicability of Title 11 provisions is, as discussed above, consistency with SIPA. See *SEC v. Wick*, 360 F.Supp. 312, 315 (N.D. Ill. 1973) (In view of clear

legislative intent, effect of SIPA on Bankruptcy Act is limited. Provisions of SIPA supersede those of Bankruptcy Act only to the extent they are inconsistent).

4. The Cases Cited by NUFIC Present No Conflict.

The cases relied upon by NUFIC compel no different conclusion. *Redington v. Touche Ross & Co.*, 612 F.2d 68 (2d Cir. 1979), addressed the issue of federal court jurisdiction of an action by a SIPA trustee against an accounting firm for damages. Its consideration of former SIPA section 78fff(c)(1) was limited to the meaning of the term in the context of a "SIPA court's powers with regard to jurisdiction and procedure." 612 F.2d at 71. It is noteworthy that a few years earlier, the Second Circuit confronted the question of whether section 241 of the Bankruptcy Act, 11 U.S.C. §641 (repealed 1979), applied to a SIPA case. *SIPC v. Charisma Sec. Corp.*, 506 F.2d 1191 (2d Cir. 1974). That provision, ostensibly a substantive one, allowed a judge to award reasonable compensation to a trustee and other officers. In determining that the provision applied, the court devised no substantive-procedural test, as NUFIC has. Cert. Pet. at 26. Instead, adhering to the language of section 78fff(c)(1), it considered only whether the provision was consistent with SIPA. 506 F.2d at 1195-1196.

Like the *Redington* case, *SEC v. Aberdeen*, 526 F.2d 603 (3d Cir. 1975), is distinguishable. In spite of some overly broad dictum in the opinion,[17] it is clear that section 243 of the Bankruptcy Act, 11 U.S.C. §643 (repealed 1979), was deemed inapplicable not because it was a substantive provision, but because in furthering a debtor's reorganization and not liquidation, it was inconsistent with SIPA. 526 F.2d at 606 (section 243 "serves to redress the balance of power between insiders and outsiders during a corporate reorganization.") As discussed above, in spite of its incor-

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[17] As noted *supra*, two years earlier, the same court referred to SIPA as an "engraftment of insurance provisions upon the preexisting section 60(e) bankruptcy provisions applicable to stockbrokers. . . ." *SEC v. Aberdeen Securities Co.*, *supra*, 480 F.2d at 1123.

poration of reorganization provisions of the Bankruptcy Act, section 78fff(c)(1) expressly prohibited a reorganization. Here too, NUFIC has presented no conflict.

At bottom, the construction of the particular contract entered into between NUFIC and GSC is significant only to the parties involved, and has no importance beyond its immediate confines. Thus, depending upon the final outcome of this matter, one party may adjust its position—a debtor, if feasible, perhaps by giving notice of a possible loss prior to being placed in liquidation, and the insurance company, perhaps by revising its premiums. At any rate, it is plain that the questions raised by NUFIC fall far short of the kinds that are appropriate for review by this Court. The statement in *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923), is particularly applicable:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case certainly comes under neither head.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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STATUTORY APPENDIX

Section 7(d) of the Securities Investor Protection Act, 15 U.S.C. §78o(c)(3) (1970):

(d) FINANCIAL RESPONSIBILITY.—Section 15(c)(3) of the Securities Exchange Act of 1934 is amended to read as follows:

"(3) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility and related practices of brokers and dealers including, but not limited to, the acceptance of custody and use of customers' securities, and the carrying and use of customers' deposits or credit balances. Such rules and regulations shall require the maintenance of reserves with respect to customers' deposits or credit balances, as determined by such rules and regulations."

Section 7(a) of the Securities Investor Protection Act, 15 U.S.C. §78fff-1(a) (1981):

> A trustee shall be vested with the same powers and title with respect to the debtor and property of the debtor, including the same rights to avoid preferences, as a trustee in a case under title 11.

Section 102(3) of the Bankruptcy Code, 11 U.S.C. §102(3) (1992):

> Rules of construction. In this title—
>
> * * *
>
> (3) "includes" and "including" are not limiting . . . .

Section 6(c)(1) of the Securities Investor Protection Act, 15 U.S.C. §78fff(c)(1) (1970):

> Except as inconsistent with the provisions of this chapter and except that in no event shall any plan of reorganization be formulated, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under, the provisions of chapter X and such of the provisions (other than section 96(e) of Title 11) of chapters I to VII, inclusive, of the Bankruptcy Act as section 502 of Title 11 would make applicable if an order of the court had been entered directing that bankruptcy be proceeded with pursuant to the provisions of such chapters I to VII, inclusive. . . .